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In The

Supreme Court of the United States

October Term, 1979

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ROBERT PARRATT and
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———o———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in the above noted case on January 29, 1980.

———o———

I.

CITATIONS TO THE OPINIONS BELOW

The opinion of District Judge Albert G. Schatz granting the plaintiff's motion for summary judgment is un-

reported and appears as Appendix B, *infra*. The opinion of the Court of Appeals is also unreported and appears as Appendix C, *infra*.

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II.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed January 29, 1979. The petitioners' petition for rehearing to the Circuit Court of Appeals was denied on February 29, 1980. The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1).

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III.

QUESTIONS PRESENTED

1. Whether simple negligence, if proven, may form the basis of a judgment under 42 U. S. C. § 1983.

2. Where a state prisoner claims to have suffered a tortious loss of property, whether the existence of a state tort claims remedy available to that prisoner provides him with such a level of due process as to satisfy the requirements of the Fourteenth Amendment.

3. Whether certain types of property are so *de minimis* as to not be protected by the Fourteenth Amendment under 42 U. S. C. § 1983.

4. Whether this record supports a finding of negligence on the part of either defendant.

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IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 42 U. S. C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Neb. Rev. Stat. § 81-8,209, et seq. (Reissue 1976), *see* Appendix E, *infra*.

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V.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the District of Nebraska under 42 U. S. C. § 1983, by a prisoner of the State of Nebraska to recover the value of certain hobby materials lost while they were being stored for the prisoner (Taylor) at the Nebraska Penal and Correctional Complex (NPCC), Lincoln, Nebraska. Named as defendants were Robert F. Parratt, Warden of NPCC and Francis Lugenbill, Hobby Manager at NPCC. The materials in question here were valued at $23.50. The case was submitted to the district court upon the plaintiff's motion for summary judgment and a stipulation of facts (Appendix A).

The hobby materials were mail ordered by the prisoner in accordance with NPCC procedures. However, when the materials arrived at NPCC the plaintiff had been placed in disciplinary segregation (Adjustment Center) and was not entitled to receive them. The materials were receipted into the institution by an inmate hobby clerk and a civilian hobby counter employee. Neither the inmate hobby clerk nor the civilian employee were named as defendants in this case.

After being receipted into NPCC the materials were stored at the hobby counter until Taylor was entitled to take possession of them. When Taylor attempted to claim the goods they could not be located.

The district court, upon consideration of the stipulated set of facts (Appendix A) entered summary judgment for the plaintiff against defendants Parratt and

Lugenbill in the amount of $23.50 (Appendix B). The district court, in its Memorandum Opinion specifically held that "negligence can form the foundation for an action under section 1983" (Appendix B, p. 3). Having made that determination, the district court then entered a personal judgment against these two defendants although neither the record in this case nor the district court's opinion reflect *any* direct involvement in this matter by either defendant.

On appeal the judgment of the district court was summarily affirmed (Appendix C) and the defendants' motion for rehearing denied (Appendix D).

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VI.

REASONS FOR GRANTING WRIT

I.

The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter.

The Eighth Circuit Court of Appeals in this case has rendered a decision in direct conflict with decisions of other circuits. In affirming the decision of the district court the Eighth Circuit stated:

> "This is an appeal from a summary judgment granted appellee, Taylor, by the district court. The appellee brought the action under 42 U. S. C. § 1983 claiming that prison officials had violated his constitutional rights by negligently depriving him of property without due process.

> "We have thoroughly examined the record and now determine that, based upon the record and the oral arguments, the judgment of the trial court should be affirmed."

This ruling is in direct conflict with the holding of *Bonner v. Coughlin,* 517 F. 2d 1311 (7th Cir. 1975), *mod.en.banc.* 545 F. 2d 565, *cert. denied* 435 U. S. 932. That case also involved the negligently caused loss of a state prisoner's property:

> "We hold that the negligence of the guards which caused the loss of Bonner's transcript was not a State deprivation of property without due process of law under the Fourteenth Amendment nor action 'under color of state law' under section 1983." *Id.* 545 F. 2d at 567.

In reaching this conclusion the Seventh Circuit Court of Appeals noted:

> "[T]he majority of Circuits hold that mere negligence does not state a claim under Section 1983." *Id.* at 568.

The Seventh Circuit has recently reaffirmed that position in *Beard v. Mitchell,* 604 F. 2d 485 (7th Cir. 1979).

Also in 1979, the Fifth Circuit Court of Appeals reversed the position it had previously taken in *Whirl v. Kern,* 407 F. 2d 781 (5th Cir. 1969), *cert. denied* 396 U. S. 901, and held that "proof of simple negligence is not enough to pierce official immunity" in a case concerning conditions of state prisoners' confinement. *Jones v. Diamond,* 594 F. 2d 997, 1004 (5th Cir. 1979).

In the First Circuit it has also been held that officials of government cannot be held liable under § 1983 for the negligent acts of their subordinates.

> "The vast majority of those courts which have considered the issue have not held high level officials liable for failing to supervise correct and control the actions of their subordinates." *Leite v. City of Providence,* 463 F. Supp. 585, 589 (D. R. I. 1978).

This ruling is directly contrary to the conclusion reached by the district court in this case. Here two supervisors are held personally liable for the loss of a prisoner's property *solely* upon the *presumption* that they negligently supervised their subordinates.

The Second Circuit Court of Appeals has also denied recovery under § 1983, where the plaintiffs' property was allegedly taken by the negligence of the government. *O'Grady v. City of Montpelier,* 573 F. 2d 747 (2d Cir. 1978).

In the Third Circuit, on another set of facts very similar to those presented here, a state prisoner was denied recovery of damages for property loss on a simple negligence theory under § 1983. In *Thorton v. Redman,* 435 F. Supp. 876 (D. Del. 1977), property of the prisoner was properly confiscated and subsequently lost.

> "Obviously, no procedures the defendant's might have employed would have provided an absolute guarantee against excessive and illegal acts such as pilfering by subordinates. But the Constitution does not require that of them." *Id.* at 881.

In the present case, however, the Eighth Circuit has required the defendants to act as *insurers* of the property of inmates held in the institution under their control. We see no justification for grafting such a broad new basis for liability upon § 1983.

The only circuit which we have discovered which has taken a position similar to that of the Eighth Circuit is the Fourth Circuit. *McCray v. State of Maryland,* 456 F. 2d 1 (4th Cir. 1972). Thus, a clear split of authority exists among the circuits on this issue which can only be resolved by this court granting certiorari in this case.

II.

This case raises important questions of federal law which have not been resolved by this Court.

A.

May simple negligence, if proven, create liability under 42 U. S. C. § 1983?

Monroe v. Pape, 365 U. S. 167 (1960) contained the following language:

> ". . . insofar as [§ 1983] creates an action for damages, [it] must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts." *Id.* at 187.

Whether this language indicates an intent to allow recovery under § 1983 for the negligent acts of defendants has yet to be resolved.

> "The question of whether negligence gives rise to a section 1983 action is hardly novel. Various federal courts have considered the question and reached varying results. The United States Supreme Court has yet to decide the issue of whether section 1983 affords 'a remedy for negligent deprivation of constitutional rights.' *Procunier v. Navarette,* 434 U. S. 555, 566, n. 14, 98 S. Ct. 855, 862, 55 L. Ed. 2d 24 (1978)." *Leite v. City of Providence, supra,* at 589.

In *Estelle v. Gamble,* 429 U. S. 97 (1976), this Court *required* a showing of wanton, reckless or grossly negligent behavior to impose liability under § 1983 in a medical treatment case. We see no justification for imposing a broader standard of liability in cases protecting a prisoner's property than in cases where a question of his health is concerned.

In this case there is no evidence or allegation that either of the defendants (1) took the property in question; (2) intended the loss to occur or; (3) evidenced a wanton, willful or reckless disregard for its safety. There may or may not be evidence of simple negligence. We do not believe there is. But simple negligence should not be allowed to create liability under § 1983. To do so would broaden the applicability of § 1983 beyond its intended limits. It would also, as these facts evidence, turn the federal courts into small claims courts for every pack of cigarettes or pair of socks lost in every state penal institution in America. We can't imagine that Congress intended or this Court desires that result.

From the number of recent cases cited in Part I of our application this issue appears ripe for decision by this Court.

B.

Is a state prisoner provided adequate due process under the Fourteenth Amendment where the State affords him a remedy to redress the loss of property negligently caused by its agents?

The State of Nebraska provides a remedy to persons who believe they have suffered a tortious loss at

the hands of the state. Neb. Rev. Stat. § 81-8,209, et seq. (Reissue 1976). *See,* Appendix E, *infra.* Through this tort claims procedure the State of Nebraska annually hears and, where appropriate, pays claims of prisoners housed in its penal institutions. This procedure was in existence at the time of the loss here in question. The plaintiff did not choose to employ this remedy. He sought relief, instead, under § 1983 claiming he had been denied property without due process of law. The plaintiff's theory of recovery was simply negligence.

The Fourteenth Amendment provides:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Exactly what process is due the plaintiff under these facts?

A negligent act is, by definition, unintentional. It is obvious that a state cannot establish a *pre-loss* process to remedy a loss a person might suffer as the result of the *unintentional* act of a state employee or agent. The only possible solution is a system by which the plaintiff's negligently caused loss may be remedied *after the fact.* The State of Nebraska has provided such a system. What more in the way of due process could be required?

There can be no violation of a plaintiff's Fourteenth Amendment rights if he, in fact, receives due process from the state. If the state makes available an adequate remedy, the plaintiff is provided the process he is due under the Fourteenth Amendment and no constitutional violation exists. In the absence of a constitutional violation, the federal courts have authority to order relief under § 1983.

The Second Circuit Court of Appeals reached a similar conclusion in *O'Grady v. City of Montpelier, supra*:

> "While a state statute or constitution may create the right to compensation when the grade of a road is altered, the protection thereby afforded exceeds that which is available under the Fifth and Fourteenth Amendments.
>
> ". . .
>
> "Appellants may have a right to compensation under Vermont law, but this does not necessarily mean they have been deprived of their property in the sense contemplated by the Fifth and Fourteenth Amendments." *Id.* at 750-751.

That court further indicated the existence of a state remedy for payment of just compensation might eliminate any claim of constitutional violation. *Id.* at 751-752. A similar conclusion is discussed in *Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment,* 52 IND. L. J. 257 (1976).

Certainly the question of whether state law provides an adequate remedy can be considered in a federal due process context and if those safeguards are adequate no federal intrusion is necessary. *Ingraham v. Wright,* 430 U. S. 651 (1977). Cited with approval in *Ingraham v. Wright, Id.,* is the following language from *Mathews v. Eldridge,* 424 U. S. 319, 348 (1976):

> ". . . At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost. . . ."

We believe that point has been reached here. When one balances the cost inherent in allowing state prisoners a federal as well as a state forum for the redress of allegedly tortious property losses the incalculable expense incurred certainly outweighs the benefit afforded.

C.

Property valued at $23.50 is de minimis and its loss does not invoke the protection of the Fourteenth Amendment.

The district court awarded judgment against these defendants for the value of the property lost: $23.50. This Court has recognized that there are minimal limits to the value of property to be afforded due process protection. *Fuentes v. Shevin,* 407 U. S. 67, 90, n. 21 (1972); *Sniadach v. Family Finance Corp. of Bay View,* 395 U. S. 337, 342 (1962) (Harlan, J., concurring). As we noted earlier, if some minimal value of property does not fall beyond or beneath the protection of the Fourteenth Amendment, the federal courts will become embroiled in the litigation of matters of even less consequence than the present case. Again we do not believe this was the intent of Congress or the framers of our Constitution.

Within the Eighth Circuit, prior to this decision, that court had rejected certain levels of property loss as being below the protection of the Fourteenth Amendment. *Nickens v. White,* 536 F. 2d 802 (8th Cir. 1976); *Howard v. Swenson,* 426 F. 2d 227 (8th Cir. 1970), *cert. denied* 400 U. S. 948.

III.

The manner in which the Circuit Court has proceeded in this instance allows differing standards to be employed among the various districts in the circuit. That situation requires this Court's intervention.

Neither the district court's nor the Eighth Circuit's opinions have been published in this case. The result of this action, if not corrected by this court, will be to allow one standard of liability to exist in the federal courts of Nebraska and yet another standard in other districts within the Eighth Circuit. The Eighth Circuit has silently allowed these defendants to be penalized under a standard of liability clearly rejected by other districts in that circuit. In *Harvey v. Clay County Sheriff's Department,* 473 F. Supp. 741 (W. D. Mo. 1979), that court citing *Bonner v. Coughlin, supra,* dismissed an action against prison officials stating:

> "Plaintiff's allegations amount to no more than a claim that defendant's Houston and Kent were negligent in failing to take a more active role in separating the two potential [inmate] combatants. As such, it is not cognizable in an action under § 1983." *Harvey v. Clay County Sheriff's Department, supra,* at 746.

Furthermore, the Eighth Circuit has consistently rejected a simple negligence theory of liability in medical treatment cases (*Hall v. Ashley,* 607 F. 2d 789 (7th Cir. 1979)), but now quietly imposes a broader theory of liability under property loss circumstance without explanation. We are unaware of any basis, under § 1983, for such a distinction in interpretation.

IV.

The record in this case does not establish any basis for liability in these defendants even if a negligence theory were to be adopted.

Neither the stipulation (Appendix A) upon which this decision was based nor the Memorandum Opinion (Appen-

dix B) establish the responsibilities of either of the defendants with respect to the loss in question. Neither of these documents establish what the respective responsibilities of either of these defendants were to the prisoner's property or in what manner those duties may have been breached. Even under the broadest background of tort liability the facts before the district court do not make out a case against either of these defendants.

The district court announced, and the Circuit Court affirmed this statement of the law:

> "The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in loss of personal property for Mr. Taylor, which should not go without redress." (Appendix A, p. 5.)

The Eighth Circuit has consistently rejected, at least until its ruling in this case, the proposition that the tort doctrine of respondent superior was applicable to § 1983 cases. *Sebastian v. United States,* 531 F. 2d 900 (8th Cir. 1976); *DeShields v. United States Parole Commission,* 593 F. 2d 354 (8th Cir. 1979).

If these defendants were not held liable as the "innocent masters" of negligent institutional personnel, then the defendants must have been found liable based upon some specific personal involvement in this incident, but they had none. The record reflects none. The district court points to none. The record does not establish negligence on the part of these defendants under any acceptable standard.

The record does not establish that the mail distribution system was generally defective but that it failed in

one instance. That single instance of failure cannot create liability in anyone presently before this Court.

———o———

CONCLUSION

It is our firmly held belief that the insubstantial underpinnings of the district court's decision and the quiet affirmance of that decision by the Circuit Court of Appeals reflects not a studied judgment of the law and facts in this case, but the courts' single-minded irritation with our steadfast refusal to settle this case.

We did not settle this case for two reasons. First, we did not believe the plaintiff had established or could establish adequate facts to create liability under a proper interpretation of § 1983. Second, the plaintiff, who had legal counsel throughout these proceedings, had a completely adequate remedy under state law available to him, and refused it.

This is not an isolated case. As the court noted in *Thorton v. Redman, supra,* no institution can *guarantee* the security of property held for its inmates. Yet that is what the Circuit Court of Appeals has required here. Despite the best efforts of all involved property will occasionally be lost, mislaid or stolen. Each such instance, under the rulings here appealed, could subject the warden of a state penal institution and his subordinate supervisors to personal liability for damages and attorneys fees in federal court. Such rulings do not further the legitimate purposes of § 1983. They simply tend to smother

the federal courts with litigation more appropriately and easily resolved by state courts and tort claims systems.

The impact of the issues raised here are substantial. A decision by this Court on those issues is necessary to resolve a conflict between the Circuit Courts of Appeals and to resolve important questions of federal law. We therefore urge this Court to grant our petition.

Respectfully submitted,

ROBERT PARRATT and FRANCIS LUGENBILL, Petitioners

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

STIPULATION

(Filed January 18, 1978)

COME NOW the parties hereto and hereby stipulate that the testimony of Mr. Robert Rybolt would be as follows:

1. That Robert Rybolt was the Grievance Supervisor at the Reformatory at the time of the incident alleged herein.

2. That plaintiff ordered certain hobby materials from supply houses in California and that for purposes of payment therefor two drafts or checks were issued upon plaintiff's inmate account and accompanied order.

3. That the packages described herein arrived at the Nebraska Penal Complex on or about April 15, 1975 and that said package receipts were signed on or about April 21, 1975 by Mr. Paul Geros and Mr. Chuck Kostos who were assigned to the Prison Hobby Center. At the time the packages arrived at the Institution Mr. Taylor

was in the Adjustment Center at the Nebraska Penal Complex.

4. That Mr. Taylor was in Deadlock in the Reformatory at the time he contacted Mr. Rybolt regarding said packages and that Mr. Taylor was not permitted "hobby" at that time and the packages had never been in Mr. Taylor's possession.

5. That Mr. Robert Rybolt was contacted by Mr. Taylor on numerous occasions and that Mr. Rybolt personally searched for said packages after contacting Mr. Francis Lugenbill regarding said packages and that subsequent searches did not turn up said packages.

6. That neither the packages nor the contents of same have ever been turned up.

7. Normal procedure when a package is received at the Institution addressed to an inmate at the Central Mail Room it is either that the package is delivered to the inmates cell where he signs the package receipt or the inmate is notified to pick up the package at the hobby center and to personally receipt therefor.

8. Deviations from this practice are made only in exceptional circumstances; and there is no evidence or record of there having been any exceptional circumstances with respect to the packages in question.

9. That it is not Institutional policy for one inmate to sign for another inmate's package because the package receipt is the record of the inmate's receiving the package.

10. There is no record of Mr. Taylor ever receiving said packages.

11. Over a considerable period of time plaintiff made numerous inquiries and requested assistance in tracing his packages. None of the efforts of the persons so contacted were productive of any further information regarding the disposition of said packages.

12. Other than the receipts mentioned in paragraph 3 there is no record of the disposition of the packages or the whereabouts of same.

13. That there is no record indicating personal receipt of the packages by Mr. Taylor.

BERT TAYLOR, JR., Plaintiff

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

MEMORANDUM OPINION

(Filed October 25, 1978)

This civil rights action pursuant to 42 U. S. C. § 1983 is before the Court on a motion for summary judgment by the plaintiff, Bert Taylor. The plaintiff claims that he has been denied certain property, that is, a hobby kit valued at $23.57, without due process of law. This Court has jurisdiction under 28 U. S. C. § 1343. The parties entered into a stipulation of facts which are these:

Mr. Taylor ordered a kit through the mail and paid for the order with two drafts drawn on his inmate account by the prison officials. The packages arrived at the penal complex on April 15, 1975, and were signed for by inmates assigned to the hobby center. Mr. Taylor was in the adjustment center at the time and not permitted to have such hobby materials. Normal prison policy for the receipt of mail packages is that after packages arrive in the central mail room, they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package

and sign a receipt for the package at that time. It is not a policy to allow other inmates to sign for packages because the receipt is the prison's record of having delivered the package to the prisoner. Deviations from these regulations occur under exceptional circumstances, but no such circumstances existed here. Mr. Taylor contacted several officials in regard to the whereabouts of his packages but no one was able to find them. Mr. Taylor has never received the packages.

Three issues are presented by the motion for summary judgment: whether negligent action by state officials can be a basis for an action under 42 U. S. C. § 1983; whether penal complex officials are immune from damage actions of this kind; and whether a property right of this sort is cognizable under Section 1983.

The first issue that must be addressed is whether the negligence of state officials can be a basis for an action for deprivation of property under Section 1983. Section 42, United States Code, Section 1983, provides in pertinent part:

> Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Howell v. Cataldi,* 464 F. 2d 272 (3d Cir. 1972), the court analyzed a damage action under Section 1983 in the following manner: the petition must show that the conduct was done by someone under color of law and

that the conduct subjected the complainant to a deprivation of rights secured by the Constitution. Once deprivation has been established, the proof proceeds against a background of tort liability. The court stated:

> Thus, although proof of specific intent to deprive a person of his federally protected rights is not required, there must be at least proof of the "condition usually demanded by the law for liability in an action of tort (which) is the existence of either wrongful intention or culpable negligence on the part of the defendant." Salmond, *Law of Torts,* 6th Ed. 1924 p. 11.

This "background of tort liability" was originally discussed in *Monroe v. Pape,* 365 U.S. 167 (1961):

> The word "wilfully" does not appear in Section 1979 (Section 1983). . . . Section 1979 (1983) should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Therefore, under *Monroe* and *Howell, supra,* negligence can form the foundation for an action under Section 1983. Most actions under this section have involved personal injuries; however, the Eighth Circuit has specifically recognized actions involving a deprivation of property as cognizable under Section 1983. *See Nickens v. White,* 536 F. 2d 802 (8th Cir. 1976).

The second issue is whether the prison officials are immune from a damage action such as this. In *Procunier v. Navarette,* 46 U.S.L.W. 4144 (February 22, 1978), it was alleged that prison officials had negligently and inadvertently misapplied prison regulations which denied prisoners their constitutional rights. The prison officials defended on the basis that the officials were immune

from damage actions under Section 1983. The Court's decision supplied only qualified immunity and stated the standard as follows:

> The immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct.

The officials in *Procunier* were granted immunity because at the time the cause of action arose, there was no clearly established first amendment right protecting the mailing privileges of state prisoners. In dicta, *Procunier* established that total immunity is not available for prison officials, but the question of whether negligent conduct by prison officials could form the basis for a cause of action under Section 1983 was never reached. This court must consider other case law for direction on that question.

In *Wood v. Strickland,* 420 U.S. 308 (1975), a suit was brought against members of a Board of Education by two students who were suspended for several months for allegedly "spiking" punch with two bottles of malt liquor at a school function. The school board members raised the defense of absolute immunity from damage actions. The district court found the school board members immune; however, the circuit court reversed and reached the merits of the decision. On review by the Supreme Court, the following standards for immunity were set forth:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the ac-

> tion he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." (Citation omitted.) A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot be characterized as being in good faith.

The plaintiff argues that under the *Woods* analysis, the prison officials knew or reasonably should have known that their failure to follow normal procedures would result in a violation of Mr. Taylor's constitutional rights and are, therefore, not immune from suit under Section 1983. This court finds that the *Woods* analysis is applicable to actions against prison officials and that no immunity from suit exists in this situation where the defendants knew or reasonably should have known that their actions would result in a violation of Mr. Taylor's rights.

The final issue is whether the specific deprivation of property, a hobby kit, implicates due process rights. In *Nickens, supra,* the Court found that the confiscation of a mail order catalog was so deminimus that due process rights were not infringed. *See also Pitts v. Griffin,* 518 F. 2d 72 (8th Cir. 1975), involving the confiscation of a multi-frequency radio pursuant to prison regulations limiting radios to AM frequencies; *Rhodes v. Sigler,* 448 F. 2d 1237 (8th Cir. 1971), concerning a prison bill for $2.45; *Howard v. Swenson,* 426 F. 2d 277 (8th Cir. 1970), in-

volving the confiscation of several pairs of shoes. However, in the instant case, Mr. Taylor received authorization to procure the hobby kit and requested that prison personnel withdraw payment for the kit from his prison account. The hobby kit was ordered and paid for, sent to Mr. Taylor through the United States mails, and received by the prison but never delivered to Mr. Taylor. This is not a situation where prison officials confiscated contraband. The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for Mr. Taylor, which loss should not go without redress.

Accordingly, this Court finds that the plaintiff is entitled to prevail on the motion for summary judgment and to an award for damages and attorney fees under 42 U. S. C. § 1988. However, an order according to this memorandum will not be entered until such time as the parties are heard with reference to attorney fees. To that end, if the parties are unable to agree and stipulate to a fee, without prejudice to their respective rights to appeal, within ten (10) days from date hereof, they shall so notify this Court so that a hearing date may be scheduled and the matter presented to the Court for determination.

BY THE COURT:

/s/ Albert G. Schatz

Judge, United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 79-1514

BERT TAYLOR, JR.,

Appellee,

vs.

ROBERT PARRATT, individually and in his official capacity as Warden of the Nebraska Penal Complex; FRANCES LUGENBILL, individually and in his official capacity as Hobby Manager of the Nebraska Penal and Correctional Complex,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: January 15, 1980
Filed: January 29, 1980

Before ROSS and HENLEY, Circuit Judges, and PORTER, District Judge.*

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* The Honorable Donald J. Porter, United States District Judge for the District of South Dakota, sitting by designation.

PER CURIAM.

This is an appeal from a summary judgment granted appellee, Taylor, by the district court. The appellee brought the action under 42 U. S. C. § 1983 claiming that prison officials had violated his constitutional rights by negligently depriving him of property without due process.

We have thoroughly examined the record and now determine that, based upon the record and the oral arguments, the judgment of the trial court should be affirmed.

Accordingly, pursuant to Rule 14 of the Rules of this court, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(NOT TO BE PUBLISHED.)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1514

BERT TAYLOR, JR.,

Appellee,

vs.

ROBERT PARRATT, etc., et al.,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

On motion of counsel for appellants, and for good cause shown, it is now here ordered that appellants may have to and including February 22, 1980 in which to file petition for rehearing.

February 15, 1980

APPENDIX E

(p) STATE CLAIMS BOARD

81-8,209. *Tort Claims Act; purpose.* The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state or any state agency on any tort claim except to the extent, and only to the extent, provided by this act. The Legislature further declares that it is its intent

and purpose through this enactment to provide uniform procedures for the bringing of tort claims against the state, and that the procedures provided by this act shall be used to the exclusion of all others.

81-8,210. *Terms, defined.* As used in this act, unless the context otherwise requires:

(1) State agency shall include all departments, agencies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska, but shall not include corporations that are essentially private corporations. State agency shall not be construed to include any contractor with the State of Nebraska;

(2) State Claims Board shall mean the board created by section 81-8,220;

(3) Employee of the state shall mean any one or more officers or employees of the state or any state agency, and shall include duly appointed members of boards or commissions when they are acting in their official capacity. State employee shall not be construed to include any contractor with the State of Nebraska;

(4) Tort claim shall mean any claim against the State of Nebraska for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death, but shall

not include any claim accruing before January 1, 1970; and

(5) Award shall mean any amount determined by the State Claims Board to be payable to a claimant under section 81-8,211, or the amount of any compromise or settlement under section 81-8,218.

81-8,211. *State Claims Board; authority.* Authority is hereby conferred upon the State Claims Board, acting on behalf of the State of Nebraska and with the advice and approval of the Attorney General, to consider, ascertain, adjust, compromise, settle, determine, and allow any tort claim as defined in this act. If any tort claim is compromised, settled, or allowed in an amount of more than five thousand dollars, the unanimous approval of all members of the State Claims Board and the Attorney General shall be required, and such claims also shall be approved by the district court for Lancaster County. When approval of the district court is required, the Attorney General shall make application for such approval and shall file with the application a complete record of the action of the State Claims Board on such claim. The claimant may join in such application, and if the claimant does so the court may proceed to act on the application without further notice to either party. If the claimant does not join in the application, the court shall require actual notice to all parties before acting on the application. The court may deny the application for any legal and sufficient reason, or may direct the State Claims Board to conduct further hearings on any material issues. The fees of the clerk of the district court for filing, docketing, and indexing such application shall be five dollars.

81-8,212. *Tort claims; filing; secretary; process on Attorney General.* All tort claims under this act shall be filed with the secretary of the State Claims Board. The secretary shall immediately advise the Attorney General of the filing of any claim, and it shall be the duty of the Attorney General to cause a complete investigation to be made of all such claims. In any suit brought under this act, service of process shall be made on the Attorney General.

81-8,213. *Suit; time for filing.* No suit shall be permitted under this act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within six months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under this act.

81-8,214. *District court; jurisdiction; no jury.* The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act. Suits shall be brought in the district court of the county in which the act or omission complained of occurred, or if the act or omission occurred outside the boundaries of the State of Nebraska, in the district court for Lancaster County.

81-8,215. *Liability of state.* In all suits brought under this act, the state shall be liable in the same manner, and to the same extent as a private individual under like circumstances, except that no writ of execution shall issue against the state or any state agency, and disposition of or offer to settle any claim made under this act shall not

be competent evidence of liability of the state or any employee or amount of damages.

81-8,216. *Procedure; costs; judgment; appeal.* In all suits brought under this act, the district courts shall follow the rules of civil procedure applicable to private litigants, and costs shall be allowed in all courts to the successful claimant to the same extent as if the state was a private litigant. Judgments shall be subject to appeal to the Supreme Court in the same manner as other judgments of the district court.

81-8,217. *Judgment; effect.* Final judgment in any suit under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the state whose act or omission gave rise to the claim; *Provided,* this section shall not apply if the court rules that the claim is not permitted under this act.

81-8,218. *Attorney General; attorney for state; authority.* The Attorney General shall represent the state in any suit brought under this act, and is authorized to compromise or settle any such suit, with the approval of the court in which such suit is pending.

81-8,219. *Claims exempt from act.* (1) The provisions of this act shall not apply to:

(a) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or

an employee of the state, whether or not the discretion be abused;

(b) Any claim arising in respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer;

(c) Any claim for damages caused by the imposition or establishment of a quarantine by the state, whether such quarantine relates to persons or property;

(d) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(e) Any claim by an employee of the state which is covered by the Nebraska workmen's compensation law; or

(f) Any claim based on activities of the Nebraska National Guard, when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCA 715, or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances.

(2) With respect to any tort claim based on the alleged insufficiency or want of repair of any highway or bridge on the state highway system, it is the intent of the Legislature to waive the state's immunity from suit and liability to the same extent that liability has been imposed upon counties pursuant to section 23-2410, and only to that extent. The Legislature further declares that judicial interpretations of section 23-2410 governing the liability of counties on December 25, 1969 also shall be con-

trolling on the liability of the state for the alleged insufficiency or want of repair of any highway or bridge. It is the further intent of the Legislature that the words insufficiency or want of repair shall refer to a spot or localized highway defect and shall not be construed to refer to the general or overall condition of a highway.

81-8,220. *State Claims Board; members; legal advisor; secretary.* The Lieutenant Governor, the State Treasurer, and the Auditor of Public Accounts shall constitute the State Claims Board. The Lieutenant Governor shall be chairman of the board, and the Attorney General shall be its legal advisor. The board shall appoint a secretary and such additional administrative personnel as it deems necessary. The members of the board shall receive no compensation for their services, except that provided by law for the offices they hold, but they shall be allowed necessary traveling expenses, in performing the duties imposed by this act.

81-8,221. *State Claims Board; rules and regulations; adopt.* The State Claims Board shall adopt such rules and regulations as are necessary to carry out the provisions of this act, pursuant to Chapter 84, article 9.

81-8,222. *Department of Justice; Claims Division; deputy attorney general; duties.* There is hereby established within the Department of Justice a Claims Division, to be headed by a deputy attorney general, appointed by and under the control of the Attorney General. The Attorney General may authorize the deputy attorney general in charge of the Claims Division to perform any of the duties imposed upon the Attorney General by this

act, and may employ other persons, firms, or corporations to investigate claims under this act.

81-8,223. *Award; acceptance; effect.* Any award made under this act and accepted by the claimant shall be final and conclusive on all officers of the State of Nebraska, except when procured by means of fraud. The acceptance by the claimant of such award shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the state and against the employee of the state whose act or omission gave rise to the claim, by reason of the same subject matter.

81-8,224. *Award; certification; payment; review, when.* Any award to a claimant and any judgment in favor of a claimant under this act shall be certified by the Attorney General to the Director of Administrative Services, who shall promptly issue his warrant for payment of such award or judgment out of the Tort Claims Fund, if sufficient money is available in such fund; *Provided,* no portion in excess of fifty thousand dollars of any award or judgment shall be paid until such award or judgment has been reviewed by the Legislature and specific appropriation made therefor. Delivery of any warrant in satisfaction of an award or judgment shall be made only upon receipt of a written release by the claimant in a form approved by the Attorney General.

81-8,225. *Tort Claims Fund; established; amount; investment; appropriation.* There is hereby established in the state treasury a Tort Claims Fund from which all awards or judgments under this act shall be paid. This fund shall be in such amount as the Legislature shall

determine to be reasonably sufficient to meet anticipated biennial claims. When the amount of money in the Tort Claims Fund is not sufficient to pay any awards or judgments under this act, the Director of Administrative Services shall immediately advise the Legislature, and request an emergency appropriation to satisfy such awards and judgments. Any money in the Tort Claims Fund available for investment shall be invested by the state investment officer pursuant to the provisions of sections 72-1237 to 72-1259.

81-8,226. *Reports to Legislature; contents.* The secretary and the Attorney General shall report to each regular session of the Legislature all claims and judgments paid under this act. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim, including the agency and program or activity under which the claim arose.

81-8,227. *Tort claim; limitation of action.* (1) Every tort claim permitted under this act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by this act. The time to begin suit under this act shall be extended for a period of six months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim, or from the date of withdrawal of the claim from the board under section 81-8,213, if the time to begin suit would otherwise expire before the end of such period.

(2) If a claim is made or filed under any other law of this state and a determination is made by a state

agency or court that this act provides the exclusive remedy for the claim, the time to make a claim and begin suit under this act shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by a state agency, if the time to make the claim and to begin suit under this act would otherwise expire before the end of such period. The time to begin a suit under this act may be further extended as provided in subsection (1) of this section.

(3) This section and section 25-213 shall constitute the only statutes of limitations applicable to this act.

81-8,228. *Attorney fees; expenses; allowance.* The court rendering a judgment for the claimant under this act, or the State Claims Board making an award under section 81-8,211, or the Attorney General settling a claim under section 81-8,218, shall determine and allow reasonable attorneys' fees and expenses to be paid out of but not in addition to the amount of judgment or award recovered, to the attorneys representing the claimant.

81-8,229. *Tort claims; remedy of State Claims Act; exclusive.* From and after December 25, 1969, the authority of any state agency to sue or be sued in its own name shall not be construed to authorize suits against such state agency on tort claims except as authorized in this act. The remedies provided by this act in such cases shall be exclusive.

81-8,230. *State agency; payment of claims; provisions for.* Nothing in this act shall be deemed to repeal any provision of law authorizing any state agency to consider,

ascertain, adjust, compromise, settle, determine, allow, or pay any claim other than a tort claim as defined in this act.

81-8,231. *Claim against state; liability insurance; effect.* Whenever a claim or suit against the state is covered by liability insurance, the provisions of the liability insurance policy on defense and settlement shall be applicable notwithstanding any inconsistent provisions of this act. The Attorney General and the State Claims Board shall cooperate with the insurance company.

81-8,232. *Action against employee; act or omission of employee.* Nothing in this act shall be construed to prevent the state from bringing an action for recovery from an employee of the state when the state has made payment of an award or settlement growing out of the employee's act or omission under this act.

81-8,233. *Failure of employee to report damage or loss of property, injury or death, or cooperation with Attorney General; effect.* When any employee is involved in any occurrence involving damage to or loss of property or personal injury or death, such employee as soon as practicable shall report full information on such occurrence to the head of the agency by which he is employed. The head of the agency shall furnish immediately all available information on such occurrence to the secretary of the State Claims Board. All employees shall cooperate fully with the Attorney General in the investigation of all tort claims. Failure to comply with the provisions of this section shall constitute grounds for dismissal from employment.

81-8,234. *State Claims Board; transfer of property.* All furniture, equipment, books, files, and records in the possession of and used by the Sundry Claims Board shall be transferred and delivered to the State Claims Board on January 1, 1969.

81-8,235. *Act, how cited.* Sections 81-8,209 to 81-8,235 may be cited as the State Tort Claims Act.

81-8,236. *State Claims Board; claims against Nebraska; investigation; designation.* In addition to the powers, duties, and authority with regard to tort claims imposed by sections 81-8,209 to 81-8,235, the State Claims Board also shall receive and carefully investigate (1) all other claims against the State of Nebraska for the payment of which no money has been appropriated, and (2) all requests on behalf of any department, board or commission of the state for a waiver or cancellation of money or charges when necessary for fiscal or accounting procedures. Such claims, requests and any original papers supporting the same, shall be filed with the secretary of the board, and shall be properly designated by number, name of claimant, and short title.

81-8,237. *State Claims Board; meetings; hearings; notice.* The State Claims Board shall meet at such times and places, and shall make such investigation of each claim or request referred to in section 81-8,236, as it shall determine. If the board deems a hearing to be necessary or advisable, on any claim or request so filed, it shall give to the claimant at least five days' notice, by either registered or certified mail, of the time and place of hearing.

81-8,238. *State Claims Board; secretary; powers; duties.* The State Claims Board shall, for the purposes contemplated by sections 81-8,236 to 81-8,239, have the right, power and duty to (1) administer oaths, (2) compel the attendance of witnesses and the production of books, papers and documents and issue subpoenas for such purposes, and (3) punish the disobedience of such a subpoena or subpoenas, the refusal of a witness to be sworn or testify or the failure to produce books, papers and documents, as required by such subpoena or subpoenas so issued, as contempt, in the same manner as are officers who are authorized to take depositions.

81-8,239. *State Claims Board; claims; filing; investigation; action of board; payment.* After investigation, the State Claims Board shall either approve with conditions or limitations or disapprove of each claim or request, and append to the claim or request a concise statement of the facts brought out in such investigation upon which its approval or disapproval is based. Such claim or request, together with the original papers supporting it and the appended statement, shall be filed in the office of the secretary of the board, and delivered to the chairman of the appropriate committee of the next Legislature convening after the filing of the claim or request; *Provided,* the board may direct the payment by the state agency involved of any claim approved by it not in excess of five hundred dollars when such payment is agreed to by the head of the agency involved.